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IN THE

Supreme Court of the United States

No. 73-629

OCTOBER TERM, 1973

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

NATIONAL CASH REGISTER COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR THE RESPONDENT

ROGER F. DAY
218 East State Street
Columbus, Ohio 43215
Attorney for Respondent

Of Counsel:
CARLTON S. DARGUSCH, JR.
DARGUSCH & DAY
218 East State Street
Columbus, Ohio 43215
Dated: March , 1974

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Does Article I, Section 10, Clause 2, of the United States Constitution forbid Ohio from levying its ad valorem personal property tax on machines custom built for foreign shipment, when the machines, due to their unique physical characteristics, can only be used in foreign countries, cannot economically be converted for domestic use, and are specially packaged and stored in a warehouse awaiting certain and ultimate shipment abroad?

STATEMENT OF THE CASE

A Summary of Proceedings Below

The original proceedings in this case were brought by National Cash Register Company (NCR) to challenge an assessment by the State of Ohio of its ad valorem personal property tax. For the tax year 1968, Ohio levied this tax upon certain cash registers, accounting machines and data processing systems which NCR had manufactured pursuant to specific foreign orders and which were solely for sale and use in foreign countries. At the time of the tax levy, the machines were specially packaged for export transportation and were stored in the NCR warehouse awaiting certain and ultimate shipment abroad. NCR asserted its claim that these machines constituted exports within the meaning of Article I, Section 10, Clause 2, of the United States Constitution and were thus immune from the tax imposed by Ohio. On July 11, 1973, the Supreme Court of Ohio agreed with the contention of NCR and issued its opinion holding the machines to be export property immune from Ohio's tax. *National Cash Register Co. v. Kosydar* (1973), 35 Ohio St. 2d 166, 298 N.E. 2d 559. Rehearing was denied by the Supreme Court of Ohio on September 6, 1973. Ohio's appeal to the Supreme Court of the United States was dismissed for want of jurisdiction, however, certiorari was granted contemporaneously on December 17, 1973.

The Facts

The facts have never been disputed and they are adequately summarized in both the Brief for the Petitioner and the majority decision of the Supreme Court

of Ohio. It is, however, necessary for NCR to emphasize several of the more significant facts. The machines taxed by Ohio are machines which have been specially packaged for export shipment and which are stored in the NCR warehouse. They are highly sophisticated electronic data processing systems, accounting machines and cash registers. All have been custom manufactured pursuant to advance specific foreign orders and designed and built to meet the individual needs of foreign customers for use in foreign lands. (A. 59-67) The machines could not be constructed prior to receipt of customer orders which serve to detail the specifications for the machines and the functions they are to perform. (A. 85-97, 98) After production, all the machines have been specially packaged for export shipment and moved to the NCR warehouse. (A. 73, 98, 114, 117) Without any exception, all the machines taxed by Ohio were later sent to their foreign destinations and none has ever found its way back to the United States. (A. 89) Finally, due to their unique physical construction and special adaptation for foreign use, the machines have no application whatever in the domestic market.

The Supreme Court of Ohio found that "it was uncontroverted that due to unique construction and special adaptation for foreign use, machines marketed by the International Division [of NCR] were not merely noncompetitive in the United States market, but were not saleable there. The reasons for this include complex technical variations in keyboards, wiring, detentes and motors; and, specifically as to cash registers, variations in dispensers, the amount of characters on the keys and in the windows and in the decimal point placement. There was evidence that electrical current varied from country to country, even in parts of the same country,

in terms of standard voltage and cycles, and in some instances, as between AC and DC current. These was also testimony that the degree of merchandising control in the retailing field in the United States was technically superior to that of other countries by ten years, making machines produced for foreign customers obsolete in the domestic market." (See also A. 66-69, 74-81, 87-88.) The Ohio Court further found that "an NCR export product could not economically be converted for domestic sale. Against the company's profit margin of approximately five percent per unit, the changeover cost would be approximately 16 percent per unit, rendering the possibility of a changeover totally unfeasible." (See also A. 82-83.)

The Ohio Personal Property Tax

(1) The Nature Of The Tax

The Ohio tax involved is an *ad valorem* personal property tax. Under Ohio Revised Code Section 5709.01, all personal property located and used in business within the State is subject to the tax. With irrelevant exceptions, the tax is imposed upon all tangible personal property of a manufacturer including inventories. Under Section 5711.16, these inventories are to include all articles purchased by a manufacturer for the purpose of being used in manufacturing, and all articles which have at any time been manufactured or changed in any way by combining, rectifying, refining or adding thereto. The scope of this inventory definition includes basic materials, goods in process of manufacture and finished goods. The statutes referred to are set forth in Appendices A and B, *infra*, at pages 45 through 46.

(2) How The Tax Is Determined

The inventories of manufacturers like NCR, including raw materials, goods in process of manufacture and finished goods, are required to be listed for tax as of December 31 of each year computed by a monthly "average value" technique. Under Ohio Revised Code Section 5711.16, the averaging is ascertained by adding the inventory values held at the end of each month during the prior year, and dividing this total sum by 12. The result is the "average value" and 50% of that "average value" is listed for taxation in the current year.[1]

(3) Computation Of The Tax Assessed NCR

The only machines claimed by NCR as immune from Ohio's tax, as exports, were those machines built solely for export, packaged, warehoused and awaiting shipment as of the end of each calendar month during 1967. The monthly "average values" of these machines totaled $2,159,035 which, at 50 percent, produced a listed value of $1,079,520. The tax assessed by Ohio against these machines was at the tax rate of $46.20 per $1,000 of listed value. Consequently, the total tax assessed against NCR on the machines claimed to constitute "exports" amounted to $49,872.90. (A. 47)

(4) The Decision Of The Ohio Supreme Court

This case was decided favorably to NCR by a 5-2

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[1] Computation of the manufactured value of goods in process, as well as finished goods, must include all material costs, direct labor costs, and factory burden. See Vol. 1, *Baldwin's Ohio Tax Law & Rules*, Third (1973) Ed., p. 51, and *"Instructions and Explanations Relating to Corporation Return of Taxable Property"*, Ohio Department of Taxation (1967), p. 3.

decision of the Ohio Supreme Court. The Court held as follows:

> "This case * * * involved cash registers, accounting machines, and electronic data processing systems which have been ordered, designed and built exclusively to serve the peculiar needs of specific foreign customers. It is uncontradicted on the Record that, in every material respect, the machines involved herein are useless in the domestic market and never find their way there. Of all the cases examined, we were unable to find any situation where the 'certainty of export' has been more clearly demonstrated than in this case; the degree of certainty here exemplified is fully equivalent to that which attends the delivery of fungible goods to a carrier for the start of a journey to a foreign destination."

SUMMARY OF ARGUMENT

I. The constitutional concern with protecting from taxation that property which is to be exported from the United States to foreign countries is a pronounced one. The original Framers of our Constitution realized that vital national interests were intertwined with matters of foreign trade; national interests which transcended the need for either the federal government or the states to tax that foreign trade. To assure those dominant interests, the Framers entirely prohibited the federal government from taxing exports by Article I, Section 9, Clause 5. They likewise prohibited the states, without consent of Congress, from taxing export goods (and imports) except what was "absolutely necessary" for executing their inspection laws. Article I, Section 10, Clause 2. Today, the national interest in export

trade, and the freeing of it from state burdens, is no less than it was at the time of our constitutional genesis. Indeed, that interest is probably greater now than at any other time in our nation's history.

II. When a state seeks to impose a tax upon goods destined abroad, a point in time must be established for identifying when the constitutional immunity for exports precludes the state from levying its tax. In prior cases, this Court has held the export immunity to attach at that point in time when the goods claimed immune are shown to be (1) segregated and set apart from the mass of general property within the state, and (2) when the 'certainty of exportation' of the goods is demonstrated for all practical purposes.

The real problem in these prior cases has been to determine what state of facts must exist, at the time the tax is imposed, before the 'certainty of exportation' of the goods can be considered assured, for all practical purposes. These previous cases have involved goods and commodities like logs, baseball bats and balls, oil, and gasoline, all of which had a distinctive possibility of domestic as well as foreign use. Consequently, in measuring the 'certainty of exportation' for goods of this type, this Court has required the goods, as of the date of tax levy, to be either 'delivered to a common carrier', or 'delivered to the foreign purchaser's own vessel', or 'in actual physical movement toward the foreign destination'. With goods of this type, nothing else can suffice because, at any time before these events, the distinct possibility of diverting the goods to the domestic market is ever present. However, in no

prior case has this Court prescribed a sole and singular test for measuring the 'certainty of exportation' of goods. Instead, the totality of factual evidence in each case has been the most important consideration in assessing that certainty.

III. Export immunity is required for the NCR machines upon which Ohio levied its personal property tax. These machines were custom built in accordance with prior orders of foreign purchasers, and were specially made to serve the needs of those foreign purchasers. They are so unique, due to their physical and functional characteristics, that they cannot be used domestically or economically converted to domestic use. Moreover, the machines were specially crated, marked for export shipment and stored in the NCR warehouse awaiting ultimate and certain shipment abroad when the Ohio tax was imposed upon them. Because of these facts, both the segregation of the machines from the general mass of property within Ohio, and the certainty of their exportation, has been shown to exist beyond any reasonable doubt. All the facts, collectively, evidence a 'certainty of exportation', as of the time of Ohio's tax, fully equivalent if not superior to the certainty of exportation that might be proved by either 'delivery to a common carrier', or 'delivery to the foreign purchaser's own vessel', or 'physical movement toward the foreign destination'.

IV. (A) Ohio's argument that goods must be in 'physical motion' toward their foreign destination to be constitutionally immune from a state property tax is erroneous. Commencement of a physical

journey is only one indicia — not indispensible and not singular — of the 'certainty of exportation'. Because matters of substance, not form, control in assessing constitutional immunities, the collective facts attending the origin and disposition of the NCR machines prove their 'certainty of exportation' and their irrevocable commitment to the export process.

(B) Ohio's argument that tax must be paid because governmental services and benefits have been bestowed by the State is without merit. This '*quid pro quo*' concept affords no ascertainable standard for measuring tax immunity conferred by the Import-Export Clause which expressly prohibits state taxes of any kind upon exports, discriminatory or nondiscriminatory, unless approved by Congress.

Moreover, Ohio has already received property tax revenues from the machines in question by prior taxation of their individual parts and assemblies during the course of manufacture. It also has alternative taxing methods existing, or available to it, by which it may reimburse itself for the cost of government. Among these alternative taxes are corporate income and franchise taxes.

ARGUMENT

I. THE CONSTITUTIONAL CONCERN WITH IMMUNITY OF EXPORTS FROM TAXATION

The Framers of our Constitution did not want Government, through its tax levies, to impede the flow of do-

mestic goods abroad, nor, in their efforts to create an enduring federalism, did they want to chance the disunity that might result to the new republic by leaving all its sovereign parts free to tax export goods as they might individually choose to do. And so they took steps to assure that these things would not happen. First, they completely forbade the federal government from levying any tax whatever upon exports. This was accomplished by the prohibition of Article I, Section 9, Clause 5 of the Constitution providing that "No Tax or Duty shall be laid on Articles exported from any state." To further implement their purposes, the Framers then precluded each state, without the consent of Congress, from levying any tax upon exports except what might "be absolutely necessary for executing its inspection Laws." Again, so concerned were they with the prospect of offensive state taxes under the guise of financing inspection laws, that even this exception was qualified to assure that state levies of this type were (1) subject to control of the Congress and (2) that the *net produce* of any such state levies (apparently the excess over cost of inspection laws) was to be for the use of the Treasury of the United States. This latter prohibition, equally applicable to state taxes on "imports", was expressed in Article I, Section 10, Clause 2, in these few words:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

Examination into the origins of these provisions will

show that they were the product of multiple compromise in an effort to reconcile diverse views and interests of the states. Notwithstanding the diversity of interests that then prevailed, the significant national interest in protecting export goods from unrestrained state taxation prodominated. Early in our constitutional existence, Mr. Chief Justice John Marsahll, in explaining 'why' the states were so expressly forbidden to levy their taxes on exports (and imports), put it in these words:

> "Plainly because, in the general opinion, the interests of all would be best promoted by placing the whole subject under the control of Congress." [2]

More than a century later (1946), this Court again reemphasized the significant national interest underlying the Import-Export Clause with specific reference to state taxes upon export goods. In rejecting a contention that the clause was designed to forbid only state taxes that "discriminated" against exports, the Court held as follows:

> "It is suggested * * * that the history of the Import-Export Clause shows that it was designed to prevent discriminatory taxes and not to preclude the levy of general taxes applicable alike to all goods. Support for that is found in the fact that this provision was defended in the Convention and later in

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[2] Motivating reasons for the tax immunity granted exports and imports were in part identified by Justice Marshall as "an apprehension that the power [to tax] might be so exercised as to disturb that equality among the states which was generally advantageous"; to preserve "that harmony between them which it was desirable to preserve"; and "to maintain unimpaired our commercial connections with foreign nations". *Brown v. Maryland*, 25 U. S. 419 (12 Wheat.) at 439. Perhaps the best summation of motivating reasons for the provision is found in the letter of Luther Martin (later Attorney General of the State of Maryland) to the Convention which finally ratified the Constitution. See Appendix C to this brief, p. 47.

the debates on the ground that it protected the inland States from levies by the coastal States through the taxation of exports. *Yet that function was only a phase of a larger design.* The Import-Export Clause was considered in connection with Article 1, §9, Clause 5, which provides that 'no tax or duty shall be laid on articles exported from any state'. The purpose was to withhold from Congress the power to tax exports, and to deprive any state of the power except with consent of Congress and even then, it seems, to require the net proceeds to be paid into the Federal Treasury. A proposal was made to prohibit the states 'from taxing the produce of other states exported from their harbours.' But that suggestion was not followed. The language adopted was supported by Madison 'as preventing all State imposts.' The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause."

Richfield Oil Corporation v. State Board of Equalization, 329 U. S. 69 at 76 and 77, with emphasis supplied.

Again, in 1959, Mr. Justice Frankfurter spoke to the predominant national values embodied within the Import-Export Clause by referring to the original reasons for it. Justice Frankfurter remarked:

"Primary among the forces which led to the inclusion of Art. 1, §10, cl 2, the Import-Export Clause, in the Constitution, was the deeply felt necessity of vesting exclusive power over foreign economic relations and foreign commerce in the new National Government. The importance of control over duties, imposts, and subsidies as an instrument of foreign trade and as a protection for the encouragement and growth of domestic manufactures was recognized as a matter of course by the Framers. For the effective exercise of this control it was necessary that the Government speak with one voice when regulating commercial intercourse with foreign nations.

> Orderly and effective policy would be impossible if thirteen States, each with their distinctive interests, and often conflicting, one with another, were allowed to exercise their own initiative in the regulation of foreign economic affairs. And so the States were prohibited from such regulation—they were forbidden, except by leave of Congress, to lay any duties on imports or on exports."
>
> *Youngstown Sheet & Tube Co. v. Bowers*, 358 U. S. 534 (dissent of Frankfurter and Harlan J. J. at 556)

Whatever the "subordinate" purposes might have been which gave rise to the constitutional immunities of exports from state taxes, the *predominant* purpose and the undeniable *general intention* of the Framers was to mark out a free path of outgoing commercial trade with foreign nations upon which no state could intrude with its levies. That early concern with national values intertwined with foreign export trade was not misplaced. Today, that concern must be intensified. Not only economic matters but national relations with powerful foreign countries now seem to hinge on advantageous exchange of goods and all that is bound up with it. Words and phrases signifying national power and national concerns express these current interests; words and phrases such as 'balance of trade', 'balance of payments', 'devaluation', 'detente', 'the Middle East', 'floating currency', to name but a few. Indeed, the national interest in export trade and the freeing of it from any state burdens, except what is absolutely necessary, may well be greater today than at any other time in our nation's history.[3]

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[3] For expositions of trade problems faced by United States business abroad, see *Law and Policy in International Business*, Vol. 5, No. 1, (1973), and *Law and Contemporary Problems*, Vol. 37, p. 219, et seq.

Recognition of these interests necessarily underlies the instant case because, in the broadest sense, the question involved is that of reconciling the national interest expressed in the constitutional immunity for export goods, like NCR's machines, and the asserted power of Ohio to levy its ad valorem property tax upon these same goods. In a narrower sense, but still expressive of these underlying competing interests, is the question of precisely *when* the constitutional export immunity attaches to goods manufactured solely for export and which have no realistic domestic use.

The argument that now follows will first be addressed to a discussion of the prior cases in which this Court has set forth two principal requirements that must be met in order for export immunity to attach, and the reasons why these requirements were formulated (BRIEF POINT II). Next, it will be shown how the NCR machines in controversy fulfill these two requirements for export immuity (BRIEF POINT III). Finally, it will be demonstrated why the arguments advanced in the brief for Ohio are without merit (BRIEF POINT IV).

II. PRIOR DECISIONS OF THIS COURT HOLD THAT EXPORT IMMUNITY PREVENTS STATE TAXATION OF GOODS AT THAT POINT IN TIME WHEN (1) THE GOODS HAVE BEEN SEGREGATED FROM THE MASS OF GENERAL PROPERTY WITHIN THE STATE, AND (2) THE CERTAINTY OF THEIR EXPORTATION IS ASSURED FOR ALL PRACTICAL PURPOSES.

In both the distant and recent past, this Court has been called upon to resolve cases concerning the point, or points, at which a state's power to tax both imported and exported property is forbidden by the Import-Export

Clause.[4] Although these cases are relatively few, the instant case is but another one of them. Its analysis, therefore, must derive from a due regard for the underlying principles and considerations upon which its predecessors were decided.

The dimensions of the general scope of constitutional immunity conferred by the Import-Export Clause were first drawn in *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, a case dealing exclusively with imported property taxed by a state under guise of a licensing law. Mr. Chief Justice Marshall, in speaking for the Court in 1827, both identified the general standard for determining import immunity and adopted the first test for measuring it. Marshall stated:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."
>
> (25 U. S. (12 Wheat.) 419, at 56, 57)

Of further relevance, Marshall refused to accept the argument by Maryland that its license tax upon the persons selling the imported goods did not constitute a forbidden tax upon the imported goods themselves. Instead, Marshall emphasized that matters of *substance, not form*, would control in assessing the constitutional

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[4] Though differences may exist between the constitutional immunity granted imports and that granted exports, the scope of the immunity in both situations share a common foundation.

immunity. In specific response to the argument, Marshall stated:

> "[T]his is varying the form, without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing things."
>
> (25 U. S. (12 Wheat.) 419, at 444)

The importance of *Brown v. Maryland* in the context of the case at bar is threefold. First, it established a *general approach* for distinguishing immune property from taxable domestic property; that is to say, the decision directed the first inquiry to be whether or not the property, at the time of a state's levy, has "become incorporated and mixed up with the mass of property in the country." It also fixed one rule for *measuring* whether the goods claimed immune have actually become mixed up with domestic property; that is to say, does the property taxed, at the time of the state's levy, remain in the "original form or package?" Finally, Marshall, with hedging foresight, declined to give a singular rule for measuring immunity in all cases by noting that it would be "premature to state any rule as being universal in its application."

In 1959, 132 years later, the essential holdings in *Brown v. Maryland* respecting imported goods were reapplied by this Court in factually different but basically similar situations. *Youngstown Sheet & Tube Company v. Bowers,* 358 U. S. 534. In *Youngstown,* steel and plywood manufacturers had respectively imported bulk iron ores and packaged wood veneers. At the time of the state/city tax levies, both the bulk ores and packaged veneers taxed remained in the same 'original form or package' as imported. However, in both instances, the

goods had arrived at their final destinations and parts were being indiscriminately used to supply daily operational requirements in manufacturing. The Court swept aside the taxpayers' contention that the goods were entitled to import immunity because they remained in their original form or package.[5] In formulating its opinion, the Court first observed that *Brown v. Maryland* taught, *inter alia,* that goods brought into this country by an importer for his own use, and used by him here, "are to be regarded as a part of a common mass of property and are not immune from taxation." Based on the collective facts presented in the cases, the Court then held that the goods in question had been *irrevocably committed* to use in domestic manufacturing and disregarded the asserted importance of the "original package" doctrine with this comment:

> "Breaking the original package is *only one of the ways* by which packaged goods that have been imported for use in manufacturing may lose their distinctive character as imports."
>
> — and —
>
> "The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, *they stood in the same relation to the state as like piles of domestic materials at the same place* that were kept for use and used in the

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[5] The Court indicated its obligation to treat the claims of immunity in a "practical way" (358 U. S. 545) citing its prior decision in *Hooven & Allison Co. v. Evatt,* 324 U. S. 652. The latter case noted that in determining and applying the constitutional immunity, the "essential nature" of the transactions would control and not the formalities or technical procedures by which the goods were imported into the country.

same way. The one was then as fully subject to taxation as the other."

(358 U. S. at 548 and 549 with emphasis supplied)

The cases just reviewed were solely confined to determining the scope of exemption of *imported* property from state taxation. However, when the judicial analysis and implementation of the scope of *export* immunity from state taxation is examined, a striking similarity in basic principles is apparent. The dimensions of export immunity were first reviewed by this Court in *Brown v. Houston*, 114 U. S. 622 (1885). In that case, Louisiana had taxed ordinary coal held for sale at New Orleans by its owner's agents. After the tax was assessed, some of the coal was sold for export. The owners claimed export immunity, but the Court held that the coal, when taxed, was not entitled to immunity stating:

"When the petition was filed, the coal was lying in New Orleans, in the hands of Brown & Jones, for sale. * * * The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans, and held there on sale, without reference to the destination, or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar.

* * * *

"It [the coal] had become a part of *the general mass of property in the state*, and as such it was taxed for the current year (1880) as all other property in the City of New Orleans was taxed."

(114 U. S. 622, at 629 and 633 with emphasis supplied)

The importance of the *Brown v. Houston* decision here is minimal, except that it drew the early parameters of

the export immunity in the same basic terms as import immunity was drawn in *Brown v. Maryland*. That is to say, the Court's initial concern in both instances was to determine if the goods claimed immune were actually a part of the "general mass of property in the state", or instead, whether the goods stood apart from the general mass of property in the state in some meaningful way. In *Brown v. Houston*, the Court recognized the crucial fact that the coal involved was, like any ordinary coal, for sale *domestically* and was in no way irrevocably committed to foreign destinations. The fact that the coal was later exported did not distinguish it from domestic coal at the time of the tax levy upon it.

The following year (1886) the Court was presented with a case offering it the first occasion to formulate a rule for measuring precisely when domestic goods were sufficiently segregated from the general mass of property to have achieved immune status as exports, just as *Brown v. Maryland* had presented the need for formulating a similar rule for measuring import immunity. The case was *Coe v. Errol*, 116 U. S. 517. There, Coe and others had cut spruce logs in New Hampshire. These logs had been brought down to the town of Errol, New Hampshire, and placed in Clear stream, and on its banks, to await high waters of spring when they were to be floated down the Androscoggin River to the owner's mill in Maine. The town of Errol levied a tax on the logs which the owners claimed violated the Commerce Clause of the Constitution. Although the case dealt solely with the Commerce Clause, the United States Supreme Court, in holding the logs properly taxed, took the occasion to announce a rule for measuring export immunity as well.

In answering the question when the immunity attached, the Court laid down what we will call the "physical movement" test which it expressed in these terms:

> "There must be a point of time when they [the goods] ceased to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. * * * Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction and liable for taxation there. . . ."
>
> (116 U. S. 517 at 525)

And so the "physical movement" test of measuring export immunity for state taxation had its beginning. Of crucial importance to the instant case, however, are the underlying reasons why the Court in *Coe v. Errol* chose to adopt the "physical movement" measure of determining export immunity. Above all, the Court was concerned with fixing a point where it could be said with reasonable assurance that the goods claimed immune were no longer "part of the general mass of property in the state" so as to be treated as any "other property of the same kind is treated." This was the expressed bedrock "hypothesis" of the physical movement measure (116 U. S. at 529) and the Court clearly pointed out *WHY* the rule fixed a proper dividing line. The Court noted that although goods may be "intended" for exportation, until they are put in actual physical motion for their final destination:

> ". . . the owner has a perfect right to change his mind. . . ."
>
> (116 U. S. at 526)

And, in speaking further of determining the immune status of general commodities like wheat, corn, cotton and cattle, under both the Export and Commerce Clauses, the Court also noted:

> "Certainly, so long as these products are on the lands which produced them they are part of the general property of the state. * * * Until launched on its way to another state [or foreign country], or committed to such state [or foreign country], its destination is not fixed and certain. *It may be sold or otherwise disposed of within the state,* and never put in course of transportation out of the state."
>
> (116 U. S. at 528, with emphasis supplied)

The quotations above demonstrate the reasons why the 'physical movement' test was selected in *Coe v. Errol* as a point of determining immunity. To be precise, the Court reasoned that until "physical movement' out of the state commenced, there had been no segregation of the goods from the common mass of property within the state, and, the owner of the goods was not compelled to send them but was still at liberty to dispose of them as he chose to do. In short, until shipment the "certainty" of destination was in substantial doubt.

The reasons for adoption of the "physical movement" test in *Coe v. Errol* provide the key to a correct analysis of all the cases that have later followed it. Although the cases are relatively few, all have involved claims of export immunity for goods which, like the logs in *Coe v. Errol,* were fungible by nature or were so treated by the Court. With several notable exceptions, the "physical movement" rule has functioned adequately enough to mark out the point at which fungible goods become "exports" immune from state taxation. To be certain, neither the respondent here, nor the Supreme Court of Ohio, has had any reason to quarrel with the "physical movement" test as it has been applied in these later cases now to be discussed. In these situations, where either fungible goods or goods that have no obvious domestic use are involved, the "physical movement" test will adequately determine the point of export immunity. Why? Because, as in *Coe v. Errol,* the commencement of

physical transportation or physical delivery to a common carrier both (1) segregates the goods from the general mass of property in the state, and (2) adequately marks the certainty of their foreign destination. Indeed, in the ordinary case involving goods having domestic utility, unless the goods have been shipped toward the foreign destination on tax lien date, or entered with a common carrier, the goods may just as well be sold before then and find a home in the domestic market.

This *diversion potential* has been the most important motivating reason why the physical movement test has been applied to resolve certain cases which have succeeded *Coe v. Errol*. Thus, in *Turpin v. Burgess*, 117 U. S. 504, decided in the same year (1886) but shortly after *Coe v. Errol*, a federal excise tax on tobacco, levied before the manufactured tobacco products left the factory, was challenged on the basis that it violated the immunity against federal tax levies conferred by Article I, §9, Clause 5, of the Constitution. On express authority of the "physical movement" test adopted in *Coe v. Errol*, the Court sustained the tax and, most significantly, noted its concern with the *diversion* potential. The Court stated:

> "In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; *they might never be* exported; whether they would be or not would depend altogether on the will of the manufacturer." [6]
>
> (117 U. S. at 507, with emphasis supplied)

[6] On authority of both *Coe v. Errol* and *Turpin v. Burgess*, a federal tax imposed upon the manufacture of all "filled cheese" was then sustained in 1904. *Cornell v. Coyne*, 192 U. S. 418. The potential of diversion of the cheese to the domestic market was not specifically mentioned in that decision. However, the Court's concern with the fact that the tax was levied on the manufacture of *all* filled cheese, regardless of foreign or domestic destination, indicated a keen awareness of the possibility of diversion potential, i.e., cheese is cheese!

Turpin v. Burgess, however, marked the beginning of difficult problems in the attempt by taxing authorities to force the "physical movement" measure of determining export immunity to fit all cases. Both the weakness and limitation of the rule became quite apparent in *A. G. Spalding Bros v. Edwards*, 262 U. S. 66 (1923). There the Federal War Revenue Act of 1917 had imposed a federal excise tax upon the "sale" of all baseball bats and balls. Spalding was assessed this tax on certain baseball bats and balls which had been ordered from it by a New York agent of a Venezuelan purchaser. Title to the goods apparently passed from Spalding to the Venezuelan purchaser (or its New York agent) at the moment Spalding delivered the goods to the possession of the exporting ocean carrier in New York, and at that precise moment the federal tax was imposed upon the sale. Despite the fact that physical movement had not commenced, the Court unanimously voided the tax on the basis of export immunity. Justice Holmes expressed the Court's reasoning in these words:

> "The transaction, from start to finish, was understood and intended by the plaintiff [Spalding] and Scholtz & Company [purchaser's agent] to be for the purpose of exporting the goods to Delgado & Compania in Venezuela. The question is whether the sale was a step in exportation assuming, as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands.
>
> * * * *
>
> "To answer it [the question of export immunity] with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law, there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any

> determination may seem arbitrary. In this case for example, while the goods were in process of manufacture they were nonetheless subject to taxation if they were intended for exports and made with specific reference to foreign wants. (Citations omitted) On the other hand, no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun."
>
> (262 U. S. at 68, 69)

The "~~division~~ diversion potential" of the bats and balls was considered by the Court as a basis for sustaining the tax, but, under all the facts of the case, it was dismissed as a mere theoretical possibility meriting no significance. Justice Holmes stated:

> "Neither does it matter that the title was in Scholtz & Company, and that, theoretically, they might change their mind and retain the balls and bats for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Company was for the purpose of Delgado & Compania, and for their account and risk. Theoretical possibilities may be left out of account."
>
> (262 U. S. at 70)

The significance of the *A. G. Spalding* case lies in the fact that the Court intentionally chose not to slavishly apply the "physical movement" test, developed in *Coe v. Errol,* as the only means of determining the point of export immunity. With "theoretical possibilities" of diversion being "left out of account", the Court held that physical delivery of the goods to a common carrier could itself mark *another* point of immunity provided the facts of the transaction, in totality, evidenced certainty of exportation.

Twenty-three years after *A. G. Spalding,* even physical

delivery to a common carrier was not demanded when the certainty of export status, at time of the state tax levy, was unequivocably evidenced in other ways. *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 66 (1946). In that case, the Court had before it a California oil refiner, Richfield, who challenged California's levy of sales tax upon the gross receipts from the sale of oil Richfield had made to the New Zealand Government. Richfield took the oil by pipeline from its California refinery to its storage tanks at the Los Angeles harbor. Pursuant to prior arrangement, the oil was to be shipped to New Zealand by the "Nucula", a New Zealand tanker. When the Nucula arrived at the port, the oil was pumped into the ship. California, relying upon its understanding of the *A. G. Spalding* case, maintained that export immunity attached only upon physical delivery of the goods to be exported to an independent 'common carrier', and contended that delivery to the purchaser's own vessel was not legally sufficient. With dispatch this Court put an end to the engrafted 'common carrier' rule, insofar as it was argued to be the *sole test* of measuring the point of export immunity, just as it had held in *A. G. Spalding* that 'physical movement' toward the foreign destination was not always a requisite. The Court struck down the California tax holding that export immunity attached to the oil upon delivery to the purchaser's own vessel because that delivery marked a certainty of foreign destination fully equivalent to that of delivery to a common carrier. Once again the Court, as it had done in *A. G. Spalding*, pointed out that, in addition to all the other facts showing a certainty of exportation, *the possibility of diversion of the oil to domestic use was unequivocally negated.* The language of the opinion in this respect is unmistakable:

"The fact that delivery to a common carrier for

export gave the sale immunity in Spalding & Bros. v. Edwards, is seized upon as stating a rule that the process of exportation has not started until such delivery has been made. And cases like Superior Oil Co. v. Mississippi, 28 U. S. 390, 50 S. Ct. 169, are relied upon as indicating that delivery to the purchaser is not sufficient. That case arose under the Commerce Clause. Mississippi was upheld in its effort to tax a distributor or wholesaler who purchased gasoline and later took it to Louisiana for sale. The Court said, p. 395, that although the course of business indicated the likely destination of the oil, it was 'in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes'. The Court held, therefore, that the tax was not on goods moving in interstate commerce. But it added, p. 396, 'Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here.'

"The certainty that the goods are headed to sea and that the process of exportation has started *may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved.* The present case is an excellent illustration. * * *

"[W]hen the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser *and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use.*"

(329 U. S. at 82, 83, with emphasis supplied)

Most significantly, the Court in *Richfield* concluded its reasoning (329 U. S. at 83) with this statement:

"The means of shipment are unimportant so long as THE CERTAINTY OF THE FOREIGN DESTINATION IS PLAIN."
(Bold print supplied)

Thus, as a result of the *A. G. Spalding* and *Richfield* decisions, it became clear that neither "physical movement" of the goods toward their foreign destination, nor actual delivery of the goods to a "common carrier" was required for export immunity to attach — provided that the "certainty of the foreign destination" of the export commodities was otherwise sufficiently evidenced. This Court has, however, continued to make it understood that the possibility of diverting the goods to the domestic market will be the vital consideration in evaluating that certainty of exportation.[7] Consequently, when goods have an obvious domestic utility, like manufacturing machinery and equipment, or gasoline, are claimed immune from state taxation, only actual physical movement in the course of transportation toward the foreign destination can unequivocally prove the certainty of their export status at the time of the tax levy. Thus, in *Empresa Siderurgica, S. A. v. County of Merced,* 337 U. S. 154 (1949), a case involving the entire machinery, equipment and removable structures of a cement plant which had *operated domestically for many years,* the Court applied the "physical movement" test stating:

". . . It is the entrance of the articles into the export stream that marks the start of the process of expor-

[7] The possibility of diversion of the goods to the domestic market has weighed heavily in state court decisions concerning immunity claims for goods having a domestic utility, like petroleum products, scrap iron and alfalfa pellets. (See cases cited at Petitioner's Brief, pp. 16-20). And compare, *Montrose Chemical Corp. v. County of Los Angeles,* 243 Cal. App. 2d 300, *cert. den.* 404 U. S. 941, where warehoused chemicals awaiting foreign shipment were granted immunity under a showing, *inter alia,* that the chemicals could not legally be marketed within the U. S.

> tation. *Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.*" [8]
> (337 U. S. at 157 with emphasis supplied)

Again, in *Joy Oil Company v. State Tax Commission*, 337 U. S. 286 (1949), the Court also emphasized that when export immunity was claimed for a commodity which might well be diverted to the domestic market, only commencement of its actual physical movement toward its foreign destination could fix the point at which immunity attached. Consequently, in *Joy Oil* the ordinary gasoline stored by the Canadian purchaser in Detroit, while awaiting transportation to Canada, was denied export immunity. Mr. Justice Frankfurther stated the basis for the denial in these words:

> "While in storage the gasoline *might have been diverted to domestic markets* without disruption of any existing arrangement for its transshipment and without even breach of any contractual commitment to a foreign purchaser. *Neither the CHARACTER OF THE PROPERTY nor any event equivalent to its redelivery to a common carrier made export certain for all practical purposes.*"
> (329 U. S. at 288, with emphasis and bold print supplied)

The 1949 decision in *Joy Oil Company* was the last time this Court has been called upon to fix any particular event, activity or occurrence which marks the point at

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[8] Although the term 'cement plant' was used as a convenient term of reference for the property claimed immune in *Empresa*, the Record in that case shows the property consisted of numerous items including machinery and equipment, removable structures, parts and supplies, gasoline engines, motors, lathes, et cetera. (See R. 23-25, 30-31; and Exhibit 5 of *A Joint Statement of Facts*, R. 63-76). Also, the dissent of Justice Frankfurther emphasizes the Court's predominant concern with the 'diversion potential' of the property. (337 U. S. at 158-160).

which the constitutional immunity for exports precludes a state from levying its tax. The progression of decisions, however, beginning with *Brown v. Maryland* and continuing through *Joy Oil Company* indelibly mark out the two conditions that must be established before export immunity will attach. These cases, collectively, demonstrate that export immunity attaches to goods at that point in time when:

(1) The goods have been physically segregated from the general mass of property in the country;

— and —

(2) The foreign destination of the goods can be proved a certainty for all practical purposes.

In view of all the cases just discussed, and the motivating reasons for their holdings, the precise questions to be answered in the instant case are these: What physical facts adequately evidence physical segregation of the NCR machines from the general mass of property in Ohio, and also, what facts suffice to prove a certainty of their exportation "for all practical purposes" in order to be immune from the Ohio levy?

III. THE MACHINES OF NCR ARE IMMUNE FROM OHIO'S AD VALOREM PERSONAL PROPERTY TAX, AS EXPORTS, BECAUSE THEY HAVE BEEN CUSTOM MANUFACTURED FOR FOREIGN PURCHASERS, SEGREGATED FROM THE MASS OF GENERAL PROPERTY WITHIN THE STATE BY SPECIAL EXPORT PACKAGING AND WAREHOUSE STORAGE, AND THEIR CERTAINTY OF EXPORTATION IS PROVED BY THE FACT THAT THE MACHINES ARE SO UNIQUE, DUE TO THEIR PHYSICAL CHARACTERISTICS, THAT THEY

CANNOT BE USED DOMESTICALLY OR ECONOMICALLY CONVERTED FOR DOMESTIC USE.

(A) The NCR Machines Were Segregated From The General Mass Of Property In The State

It is undisputed that the machines taxed by Ohio, and claimed immune by NCR, were machines which had been custom produced on foreign orders and, at time of the Ohio tax levy, were specially packaged for export shipment and were stored in NCR's warehouse awaiting ultimate and certain physical movement abroad.[9] It is also undisputed that the machines, unlike domestic counterparts, were not suitable for domestic use because of their special construction and adaptation for use solely in foreign countries. Thus, in every realistic physical sense, the NCR machines were set apart from the general mass of property both in the State and at the NCR plant itself with the export destination marked plainly on their crating. (A. 117) Indeed, it must of necessity be conceded by Ohio that, at a minimum, the machines in question were sufficiently set apart from the general mass of property in the State. And, unlike the general commodities of coal, logs, machinery and gasoline involved in *Brown v. Houston*, *Coe v. Errol*, *Empresa Siderurgica*, and *Joy Oil Company*, there is no possibility of confusing the specially built, specially packaged and warehoused machines of NCR with any domestic machines. Consequently, the first and basic requisite of export immunity has been fulfilled.

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[9] No immunity has been claimed by NCR for machines in the course of manufacture. Until fully assembled, packaged and moved from production lines to the warehouse, the machines are not considered by NCR as sufficiently segregated from other property at the NCR plant.

(B) The Certainty Of Exportation Is Proved By The Character Of The Machines And By The Other Facts Surrounding Their Origin And Disposition.

Just as physical segregation is undisputed, it is further uncontroverted that all the NCR machines, without exception, ultimately join the export stream of continuous shipment abroad to foreign destinations *from which none has ever returned.* (A. 89) Moreover, it is undeniable that all machines taxed owed their very existence to prior foreign orders; were built to serve the precise needs and specifications of the foreign customers; could not be used domestically; and could not economically be converted to a domestic use. All these facts, collectively, evidence a certainty of exportation fully equivalent, if not superior, to the certainty of exportation that might be established by 'delivery to a common carrier', as in *A. G. Spalding,* 'delivery to the foreign purchaser's own vessel', as in *Richfield Oil,* or as demonstrated by the 'physical movement' measure employed in *Empresa Siderurgica* and *Joy Oil Company.*

Admittedly, the NCR machines were not in the hands of a common carrier nor actually in transportation when Ohio's tax intercepted them. This, however, is not important within the context of the instant case because the "diversion potential", ever present in the prior cases dealing with goods having domestic utility, is completely absent here. As was said in *Joy Oil Company* (p. 288) the "character of the property" itself makes exportation a certainty "for all practical purposes". Like the oil in the hold of the foreign ship in *Richfield,* where else but abroad can the NCR machines go? Moreover, it can be said here, with even more assurance than was said by Justice Holmes in *A. G. Spalding Bros.*:

> "The fact that further acts were to be done before the goods would get to sea does not matter *so long as they were only the regular steps to the contemplated result.*"
>
> (262 U. S. 66 at 69, with emphasis supplied)

As further evidence of the certainty of export status of the NCR machines, it cannot be overlooked that the preparation and shipment of these machines abroad is a regular and continuing business practice of the company. It is not a singular occurrence. Instead, the machines form an unending line of shipment abroad. Therefore, this established export practice must also add measurably to the certainty of export of those machines warehoused but awaiting shipment. This Court has spoken directly to this point in *Richfield Oil* (citing *Superior Oil Co. v. Mississippi*, 280 U. S. 390) in these words:

> "Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion *by showing the manifest certainty of the destination* and exhibiting grounds of policy that are absent here." [10]
>
> (329 U. S. at 82, with emphasis supplied)

Finally, as this Court has already indicated in assessing tax immunities claimed under the Import-Export Clause, matters of substance and not form must control. Speaking specifically of import immunity in *Hooven & Allison Company v. Evatt*, 324 U. S. 652, 663, the Court held as follows:

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[10] A regular and continuous method of conducting shipments has weighed heavily in determining the immunity of individual shipments claimed both under the Export and Commerce Clauses. See *Carson Petroleum Co. v. Vial*, 279 U. S. 95; *Texas & N. O. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111; and *Hooven & Allison Company v. Evatt*, 324 U. S. 652, 658.

> ". . . [I]n determining the meaning and application of the constitutional provision, we are concerned with matters of substance not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which its is effected."

Just as substance over form has prevailed in assessing claims of import immunity, so too must substance over form prevail in evaluating claims of export immunity. It may well be that when a claim of export immunity is asserted for general commodities having a domestic utility (like logs, oil, gasoline and machinery), nothing less than physical delivery to a carrier or demonstrated physical movement toward the foreign destination, as of the date of tax levy, will adequately segregate the goods from the mass of general property and at the same time sufficiently prove certainty of exportation. With goods of that type, nothing else can suffice because, at any time *before* these events, the distinct possibility of diverting the goods to the domestic market is ever present. However, where, as here, the goods have no domestic utility, because of their physical characteristics, owe their very existence to prior foreign orders and are specially crated and warehoused awaiting certain foreign shipment as part of a continuing business practice, these machines have achieved a "certainty of export" beyond equivocation. To require such machines, as a condition of export immunity, to be physically delivered to a carrier or actually put in physical motion on tax lien date would serve no purpose whatever other than to substitute a matter of form for substance. On the date of the Ohio

tax levy, the certainty of exportation of the NCR warehoused machines was as firmly established and proved as it could ever be. The Supreme Court of Ohio was convinced of this certainty and, we submit, this Honorable Court should also be equally so convinced. Thus, the second and final condition of export immunity has been fulfilled and the NCR machines are entitled to export immunity.

IV. REPLY TO THE BRIEF FOR THE STATE OF OHIO

(A) Ohio's Argument That The NCR Machines Must Be In Motion Toward Their Physical Destinations Is Erroneous. It Confuses A Test For Determining Export Immunity With The Immunity Itself.

The brief for the State of Ohio seems to concede the "certainty of exportation" of the NCR machines. Therefore, instead of dealing with certainty of exportation as a matter of importance, the State bases its argument entirely on what it assumes to be a cast iron proposition of law, *i.e.* that, notwithstanding any other factual circumstances, before goods are entitled to export immunity from state taxation they must have *physically started their journey to foreign destinations.* We respond to that argument by stating that the constitutional concern of Article I, Section 10, Clause 2, is not simply one of protecting from state levies 'goods in motion', or goods 'delivered to a common carrier', or any other particular method of measurement. To the contrary, the constitutional concern is that of protecting "exports" from state taxation and not any particular way by which that export status is evidenced. Therefore, the flaw in Ohio's contention, permeating all its argument, is the miscon-

ception that physical movement of goods toward the foreign destination is itself the constitutional equivalent of export status, as opposed to being only one of the methods by which that export status can be demonstrated.

To be sure, in every case that has come before this Honorable Court, the basic problem has always been to select an event, an activity, or a composite of events or activities, that would fairly establish that point at which the *certainty of export* status could be said to exist. And, because the facts in all prior cases have varied to a marked degree, that point of certainty of exportation has likewise varied. Thus, in *A. G. Spalding Bros.* the physical delivery of the goods to a common carrier was marked as the accepted point of export certainty. And, in *Richfield Oil Company*, in view of all circumstances, the physical act of pumping the oil to the purchaser's own vessel was designated as the point of export certainty. And, in *Coe v. Errol*, *Empresa Sigerurgica* and *Joy Oil Company*, nothing less than actual commencement of physical movement of the goods abroad could suffice to fix the point of export certainty. In all these cases, it is the certainty of exportation that has been the requisite of export status protected by the constitutional immunity, and the measures of that certainty have simply differed as the circumstances have dictated. Contrary to Ohio's understanding, the cases cited above demonstrate that this Court has never pronounced a singular and sole test for measuring the certainty of exportation, nor has it ever confused the *measure* of export immunity *with the immunity itself*, which is what Ohio's argument does.

As a part of its contention that only physical movement towards the foreign destination fixes export im-

munity, the State's brief discusses the relevant cases. But it has dealt with these cases superficially, and without any observable effort to examine why the varied tests of determining certainty of exportation were dictated by the circumstances of these cases. Admittedly, the decisions are pertinent. Not, however, for their *ad hoc* espousal of sterile tests of determining export immunity — like delivery to a carrier or physical movement toward the foreign destination — but instead, for the purposes which these tests were fashioned to serve. As previously discussed in our brief (pp. 18 to 29), these particular tests of determining certainty of export immunity were required for goods and commodities like oil, logs, machinery and gasoline, all of which have a decided potential for domestic use. Until goods of this type are entered for actual shipment with a carrier, or are physically in movement toward their foreign destination, it can never be said with any certainty that:

(1) They are segregated from the common mass of property in the country; or

(2) That they will not be *diverted* to domestic use.

Both of these concerns, however, have been fulfilled in the instant case. The NCR machines have already been *segregated* from domestic goods by special export crating, marking and warehousing, and they cannot be *diverted* to domestic use due to their unique physical characteristics. To simply assert, as Ohio does, that the machines must also be in physical motion toward their foreign destination does not add one iota of "certainty" to their export commitment. In every real sense, these machines, unlike divertible commodities, are just as much exports five minutes before they are physically shipped as they are five minutes after they depart the NCR warehouse aboard a carrier.

Because Ohio's argument insists that physical motion is the *sine qua non* of export immunity, it must be asked

of Ohio why it is that even *after* initial delivery to a common carrier, and even *after* actual commencement of physical movement, this Court has denied export immunity for goods which are "suspiciously" interrupted during their transit? This is precisely what occurred in *Joy Oil Company v. State Tax Commission*, 337 U. S. 286, and within the bounds of Ohio's contentions, there can be no answer to the question posed. Certainly if physical movement is asserted as the equivalent of export immunity and its indispensable requisite, then that immunity must firmly attach at the start of the physical export journey and not fall off or disappear along the way. The true response to the question posed is that "certainty of exportation" is not established by one thing alone, but instead, by an assessment of the "collective facts" surrounding the export process involved.[11] When those collective facts portray segregation of goods from the mass of property in the country, and show a certainty of exportation for all practical purposes, the occasion for asserting export immunity has arrived. This, we submit, is the meaning of the preceding cases before this Court, and the basis upon which the instant case must be resolved. The Supreme Court of Ohio grasped this understanding when it held:

> "Of all the cases examined, we were unable to find any situation where the 'certainty of export' has been more clearly demonstrated than in this case; the degree of certainty here exemplified is fully equivalent to that which attends the delivery of fungible goods to a carrier for the start of a journey to a foreign destination."

[11] In addition to the authorities previously cited, see *Carson Petroleum Co. v. Vial*, 279 U. S. 95, where stored oil, taxed after its initial movement but prior to resumption of movement to its foreign destinations, was held immune because all the facts involved showed the oil was committed abroad. Much like NCR, in *Carson*, the shipper held prior foreign orders for its oil; the oil was produced "especially for export"; the oil was accumulated to make up an entire shipload cargo; there was no possibility of sale at the domestic locations where stored; and shipments of oil abroad was a continuing practice. (279 U. S. at 99, 100 and 109).

(B) Ohio's Argument Of Quid Pro Quo Does Not Bear Analysis.

The brief for Ohio (pp. 20-23) advances a second and special argument in support of its tax upon the NCR machines. It says that Ohio "has given [something] to NCR for which it can ask return." It says that it has provided the benefits and services of government, and schools, and the revenues from Ohio's personal property tax must be used to pay for them. But, what it says, in substance, is that the State *needs the money* and the NCR machines should simply be subjected to tax!

This type of contention, under different guises, has been raised by the taxing authority in virtually every prior case involving a claim of export immunity. In truth, it is not so much an argument as a plea, and whatever broad justification the contention may have, it is as equally valid with respect to goods already in the physical course of exportation through a state, or out of a state, as it is to warehoused goods like NCR's which are awaiting shipment. Most certainly the costs of government, for police and fire protection as examples, are just as onerous for those states and taxing districts all along the way of the journey to the port of actual debarkation abroad, as they are for the state of the goods' origin. Even being mindful that a reconcilation of the competing demands of constitutional immunity and state taxation is in the balance, and must be treated in a practical way, the *quid pro quo* concept suggested by Ohio affords this Court no ascertainable standard whatever of determining the point at which export immunity from ad valorem personal property tax should attach. Does Ohio seriously expect this Court to fashion a point of export immunity based solely on the abstract asser-

tion that Ohio is due something for undefined and unevaluated "services rendered"? [12]

Even conceding a certain broad equity to the State's contention, the State must concede at the same time that because of Ohio's unique method of taxing inventory by the "monthly average" technique, it has *already partially taxed and received revenues from the NCR machines in question.*[13] During the time these machines were nothing more than unassembled *parts*, and during the *course of their manufacture*, the value of those parts, and the "in-process" value of the machines themselves, certainly were subjected to tax by Ohio. Moreover, the export machines in controversy form but an infinitesimal part of the NCR property tax base in the State. A complete review of the total NCR Ohio property for 1968 would show assets in excess of $250,000,000,[14] and the State cannot deny that NCR's total Ohio 'property' taxes alone on these assets runs well in excess of $5,000,000 each year. In addition, NCR is subject to the full range of other taxes imposed upon Ohio manufacturers. Because of these things, NCR has every reason for believing it is a responsible corporate citizen and, as one of the largest taxpayers in Dayton, Ohio, is fully discharging its duty to bear its full share of both state and local governmental expenses.

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[12] The 'A and B' example quoted at page 22 of Ohio's brief claims that the domestic manufacturer bears a disproportionate share of the tax burden when compared to the manufacturer of foreign goods. This is purely an assumption, and without an evaluation of the full range of state taxes borne by both 'A and B', must remain an assumption. At any rate, this type of "discrimination" arises because of the export immunity itself, and *not* because of the measure by which the immunity is determined. The same "discrimination" against domestic goods occurs when immunity is determined upon delivery of the goods to a carrier or upon commencement of their physical journey. In each instance, however, the State's benefits and services to the manufacturer, or to the goods, are the same.

[13] See *Statement of the Case*, and Note (1), *supra*, at p. 5.

[14] See the NCR Balance Sheet included as part of the Ohio Personal Property Tax Return for 1968 (A. 41).

The State of Ohio advances one final contention to buttress its argument of *quid pro quo*. It cites *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, and suggests that because this Court has recognized the continuing needs of the states for tax revenue in assessing claims of Commerce Clause immunity, it must do likewise in assessing claims of export immunity. Others have advanced this contention more forcefully, but this Court has consistently rejected it with equal firmness recognizing the patent differences between the strictures of the Commerce Clause and those of the Import-Export Clause. *e.g. Fairbanks v. United States*, 181 U. S. 292; *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69. Generally speaking, it is true of course, that the power of Congress to regulate commerce among the states does not forbid state tax levies upon interstate commercial activities unless those levies discriminate against that commerce, or unduly burden or impede it in a meaningful way. But no *express prohibition* against taxation of this commerce by the states was embodied in the Constitution, and the numerous judicial decisions which have permitted it, in many fashions, have proceeded from an express awareness that in the absence of an express prohibition, and with the overwhelming need for the states to finance their very existence, there was little else to do but make that commerce share a reasonable portion of the cost of local government. Were those at "home" to bear the whole load, while their next door neighbors bought and sold at the same local market tax free?

But the prohibition of the Import-Export Clause is not the same. Unlike the Commerce Clause, it was not meant to be left open to such broad interpretation. It does not merely confer a power upon Congress "to regulate". On

the contrary, it unequivocably prohibits any state, without consent of the Congress, from levying any tax, nondiscriminatory or otherwise, "except what may be absolutely necessary for executing its Inspection laws." [15] By its argument, however, Ohio would choose, through judicial interpretation, to add still *another exception* to the prohibition:

> ". . . and except for any costs of governmental services rendered."

A second difference, vital here, is the decided lack of any demonstrated need for Ohio, or any state for that matter, to defray its cost of government by direct levies of tax on export goods with the attendant risk of impeding the exportation and sale of those goods abroad. For Ohio to simply assert a "need" to finance its existence falls far short of a showing that the need should be satisfied, in part, by the levy of its tax on machines built solely for exportation. Indeed, the instant case, involving tax amounting to $49,872.90, is the *first and only case* to ever come before an Ohio tribunal concerning a claim of export immunity, and very few such cases have come before this Court or any State Courts at any time. The paucity of litigation itself bespeaks the unimportance of this area as a source of local revenues. It is most unlikely, therefore, that any compelling need exists for Ohio to seek tax revenues from export commodities. Despite the temptation, we will not attempt to draw comparisons to, nor weigh in the balance, the vital competing national interest in exportation and export goods that presently exists — except to say that at no

[15] Under its constitutional power to "regulate commerce", Congress may ban or limit state taxation of various interstate business activities, and it has done so on several occasions. No contention can be made, however, that Congress must also act to insure that no state will tax exports.

time in our existence has this national interest been proved to be a more significant one.[16]

There is one final reason why Ohio's *quid pro quo* argument is without merit. Ohio is not confined solely to its personal property tax in making the NCR export machines pay for their asserted "share" of governmental services rendered. This Court has previously marked out some of the alternative ways available. The *net income* from the sale of these export machines may be taxed, *Peck & Company v. Lowe*, 247 U. S. 165, and Ohio does have a corporate tax based in part on income.[17] A state is also free to impose a franchise tax measured in part by the gross receipts arising from export transactions. *Canton Railroad Company v. Rogan*, 340 U. S. 511. And, perhaps, other types of taxes "in lieu of" property tax levied on the export goods themselves might not strike so directly as to afford still another way of recompensing a state. *e.g. Railway Express Agency v. Virginia*, 358 U. S. 434.

We will deal no further here with the State's contention of *quid pro quo*. In summary, it will suffice to say that this contention has been uniformly rejected by this Court on every occasion it has been offered in the past as an inducement to tax what the Constitution expressly forbids. Moreover, the argument cannot assist in the effort to fix a specific point of export immunity, in any case, because it is the immunity itself that occasions any possible existing inequity and not the measure by which

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[16] For expressions of the current economic importance of exports, see the portions of legislative history attending adoption of the "Equal Export Opportunity Act" and "International Economic Policy Act of 1972", Public Law 92-412; 86 Stat. 644, 92nd Cong., 2d Sess. (1972), and extracts from address of Deputy Secretary Kenneth Rush, U. S. Dept. of State, before the President's Conference on Export Expansion at the White House, October 11, 1973, set forth in Appendix D and E, *infra*, pp.

[17] See Chapter 5733, Revised Code of Ohio.

that immunity is determined. In addition, Ohio has already been recompensed to some degree by property taxes on the very NCR machines in question, and it has at its disposal a variety of tax methods for making any export goods bear the share of governmental costs which its Legislature should further consider appropriate.[18]

[18] The Constitution, of course, continues open for amendment. And, within the very terms of the Import-Export Clause, Congress can also "consent" to state taxation of exports if it chooses to do so. These avenues are obviously available for any state to pursue, singularly or in concert.

CONCLUSION

The NCR machines in question were ordered for export. They were designed for export. They were built for export. They are always exported, and they have no domestic use. Thus, at the time Ohio levied its tax upon these machines, both their irrevocable commitment to exportation and their certainty of exportation were established beyond any reasonable doubt.

We submit, therefore, that the Court should affirm the decision of the Ohio tribunal and hold these machines immune from tax. Nothing less will secure to the respondent its constitutionally protected rights, and, at the same time, protect those dominant interests in exportation which underlie the Import-Export Clause of the United States Constitution.

Respectfully submitted,

ROGER F. DAY
218 East State Street
Columbus, Ohio 43215
Attorney for Respondent

Of Counsel:
CARLTON S. DARGUSCH, JR.
DARGUSCH & DAY
218 East State Street
Columbus, Ohio 43215

APPENDIX A

OHIO REVISED CODE SECTION 5709.01

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

APPENDIX B

OHIO REVISED CODE SECTION 5711.16

A person who purchases, receives, or holds personal property for the purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. When such person is required to return a statement of the amount of his personal property used in business, he shall include the average value, estimated as provided in this section, of all articles purchased, received, or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying, or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combining, rectifying, refining, or adding thereto, which he has had on hand during the year ending on the day such property is listed for taxation annually, or the part of such year during which he was engaged in business. He shall separately list finished products not kept or stored at the place of manufacture or at a warehouse in the same county.

The average value of such property shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer on the last business day of each month the manufacturer was engaged in business during the year, adding the monthly values together, and dividing the result by the number of months the manufacturer was engaged in such business during the year. The result shall be the average value to be listed. A manufacturer shall also list all engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing, and owned or used by such manufacturer.

APPENDIX C

Extract of Letter of Mr. Luther Martin to the Convention Regarding Import-Export Clause

"By this same section, every state is also prohibited from laying any imposts, or duties, on imports or exports, without the permission of the general government. It was urged that, as almost all sources of taxation were given to Congress, it would be but reasonable to leave the states the power of bringing revenue into their treasuries by laying a duty on exports, if they should think proper, which might be so light as not to injure or discourage industry, and yet might be productive of considerable revenue; also, that there might be cases in which it would be proper, for the purpose of encouraging manufactures, to lay duties to prohibit the exportation of raw materials, and, even in addition to the duties laid by Congress on imports, for the sake of revenue, to lay a duty to discourage the importation of particular articles into a state, or to enable the manufacturer here to supply us on as good terms as they could be obtained from a foreign market. However, the most we could obtain was, that this power might be exercised by the states with, and only with, the consent of Congress, and subject to its control; and so anxious were they to seize on every shilling of our money for the general government, that they insisted even the little revenue, that might thus arise, should not be appropriated to the use of the respective states where it was collected, but should be paid into the treasury of the United States; and accordingly it is so determined."

Source: Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 1, p. 377.

Note: See also *United States v. County of Allegheny*, 322 U .S. 174, quoting argument of Luther Martin, Attorney General of Maryland, in *McCulloch v. Maryland*.

APPENDIX D

Extracts From the Legislative History Attending Enactment of the "Equal Export Opportunity Act" and "International Economic Policy Act of 1972", Public Law 92-412; 86 Stat. 644, 92nd Cong., 2d Sess. (1972)

In Senate Report No. 92-890 accompanying the bill (S. 3726), the need for the legislation was described in part as follows:

> "The Committee believes that Title I of this legislation is needed because the United States is handicapping itself by continuing to control the export of many items which are not of strategic value and are not controlled by our foreign competitors. While it is essential to the national security that the government continue to restrict the export of some items to Communist countries, the Committee believes that restriction of the export of items which can be bought freely from our Western European or Japanese competitors does not benefit the national security. Excessive restrictions result in a worsened balance of payments situation, fewer export sales for American industries, and fewer jobs for American workers. In 1970, the United States share of the World market was 16%, but the U. S. share of the Eastern European market was only 3%. It will be difficult to improve the export performance of United States industries in Eastern

Europe unless unnecessary restrictions which prevent them from competing on an equal footing with foreign competitors are eliminated.

* * * *

"Some of the groups of items which are now subject to unilateral controls that may not be necessary to protect the national interest are chemicals, electrical machinery including machine tools, and certain types of fabrics and materials."

Source: *U. S. Code Congressional and Administrative News*, Vol. 2, pp. 3085, 3086; 92nd Congress, Second Session (1972).

APPENDIX E

Extracts From an Address by Deputy Secretary Kenneth Rush, U.S. Department of State, Before the President's Conference on Export Expansion at the White House, October 11, 1973

"THE DEPARTMENT'S STRENGTHENED EXPORT EXPANSION SERVICES"

* * * *

"We in the State Department share with our business colleagues the basic assumption that economic strength is one of the primary foundations of national power. A sound dollar, a vigorous export trade, and a healthy climate for international investment are prerequisites for the fullest realization of all our foreign policy goals. Without our solid industrial base, our stability, and our competitiveness in world markets, we would never have been able to shoulder the tasks we have undertaken since World War II. Without our great economic strength, the United States simply could not have provided aid to war-ravaged nations, developed collective security arrangements, extended a helping hand to the developing world, and waged two major conflicts.

* * * *

"As I mentioned, we are stressing both program content and the quality of our performance in the commercial field. Foremost among our performance goals has been to involve the entire overseas mission in the task of export promotion. We have instructed our Ambassadors to insure that they have an integrated team

effort. I have personally conveyed this message to all Assistant Secretaries, to all Country Directors, and to every Embassy I have visited, and I have been gratified with the response.

"In our Embassies around the world, we are bringing to bear a team spirit on our export expansion drive. All of the elements of the mission are being harnessed in this effort.

"--We are sensitizing our political and economic reporting officers to be alert to major projects which have export potential.

"--We are obtaining through our AID missions more information about internationally financed projects and technical services which offer opportunities for U. S. business.

"--We are seeking, with the full cooperation of our military attaches, to identify commercial trade lease flowing from military sales.

"--We are publicizing through the United States Information Service our superior technology and the ability of American exporters to satisfy many local development needs.

"The important thing is that today our Ambassadors can integrate overseas activities so that political as well as economic-commercial officers are involved.

* * * *

"Finally, we are trying to insure that the staffing of our management positions properly reflects the priority we are according to our economic and commercial interests. We have designated 28 of our consulates in important commercial centers — 14 of them in Europe — as 'commercial interest posts' to be headed by officers with significant commercial experience. Relatedly we are filling roughly one-fourth of our positions of Deputy Chief of Mission, the Ambassador's second-in-command,

with officers who likewise have significant commercial experience.

* * * *

"Apart from our representational activities, we invite you to avail yourselves of the whole range of export promotion services we perform:

"--We will give you timely notice of export opportunities.

"--We will, with adequate advance warning, provide your representatives with briefings on political and economic trends in the countries they visit and arrange for them to meet foreign buyers.

"--We will provide you with background information on foreign firms.

"--We will provide government-supported exposure of your products in 14 trade center facilities and in U. S. exhibitions.

"--We will identify potential agents, distributors, and licensees for your products.

"I hope that every company throughout the country — large or small — will make use of our strengthened export promotion machinery. All of us in this government are striving to promote the closest possible government-business cooperation in support of U. S. exports. In today's international environment I am confident that partnership will improve our export performance."

Note: Contemporaneously (October 11, 1973) President Nixon announced that he was creating the President's Export Council, an organization of leading American businessmen to advise him on ways to increase U. S. overseas sales. The President's Export Council and the President's Interagency Committee on Export Expansion, working through the Council on International Economic Policy as established by the International Economic Policy Act of 1972, will recommend short-term action to achieve material improvement in the U. S. trade account, long-term programs to achieve equilibrium in the U. S. balance of payments, and action to remove domestic impediments to U. S. exports and improve or supplement existing export incentive.

Source: *Department of State Bulletin*, Vol. LXIX, No. 1793, November 5, 1973.